92-357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RUTH O. SHAW, et al.,

Appellants,

v.

JANET RENO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, RALEIGH DIVISION

APPELLANTS' REPLY BRIEF

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ARGUMENT

Summary of Argument

The "color-blind Constitution" is not an "impossible dream" but a legally binding charter of government. Therefore, North Carolina's purposeful use of racial quotas

in Congressional redistricting is unconstitutional state action, for which the Voting Rights Act provides no defense. This Court's recent reapportionment opinions[1] have made even clearer than before that Appellees -- acting with an invidious discriminatory intent -- injured Appellants' important constitutional rights as registered voters.

I. NORTH CAROLINA'S PURPOSEFUL USE OF RACIAL QUOTAS IN REDISTRICTING VIOLATED THE FOURTEENTH AND FIFTEENTH AMENDMENTS.

The Complaint, as amended, alleged that two racial quotas were used by the North Carolina General Assembly at the insistence of Attorney General Barr. One quota was for members of Congress -- that two of the twelve members of Congress from North Carolina would be black. See

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[1] Growe v. Emison, ___U.S.___, 61 U.S.L.W. 4163 (February 23, 1993); Voinovich v. Quilter, ___U.S.___, 61 U.S.L.W. 4199 (March 2, 1993).

Complaint ¶¶ 16, 23, 27, 28, 36 and 36(A). To assure filling this quota was the reason for the second quota -- that in each of two of the twelve congressional districts there must be a majority of black voters. See Complaint ¶¶ 17, 23, 27, 28, 26 and 36(A).

The Appellees and their Amici contend that, in attacking these racial quotas, Appellants are seeking to "change" the Constitution and rewrite the Fourteenth and Fifteenth Amendments. However, Appellants in their Brief on the Merits have already pointed out that the "group rights" approach of the Appellees is contrary to the "personal rights" rationale of Reynolds v. Sims, 377 U.S. 533 (1964) and its offspring.[2]

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[2] See Appellants' Brief on the Merits at pp.22-29. Likewise, this approach is inconsistent with the text of the Fourteenth and Fifteenth Amendments which refer, respectively, to "persons" and "citizens", rather than to "groups" or

Furthermore, the "color-blind Constitution", to which Justice Harlan referred in Plessy v. Ferguson, 163 U.S. 537, 559 (1896), finds substantial support in later precedents of this Court. In Buchanan v. Warley, 245 U.S. 60, 76 (1917), which invalidated a Louisville ordinance requiring separate city blocks for whites and blacks, the Court announced:

> While a principal purpose of the [Fourteenth Amendment] was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminating legislation by the states.[3]

"minorities". Thus, in Richmond v. J.A. Croson, Inc., 488 U.S. 469, 493 (1989), Justice O'Connor observed that "Rights created by the Fourteenth Amendment are by its terms guaranteed to the individual. The rights established are personal rights. Shelley v. Kraemer, 334 U.S. 1, 22 (1948)".

[3] As Justice O'Connor has pointed out, "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color". See,

In Hirabayashi v. United States, 320 U.S. 81 (1943), the Court allowed the use of a racial classification because of a national emergency; but its unanimous opinion stated: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality". [4] A few years later the NAACP Legal Defense Fund filed in

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Croson, supra, n.2 at 494 (quoting opinion of Justice Powell in Regents of the University of California v. Bakke, 438 U.S. 265, 289-290 (1978)). In a parallel context the Court reasoned that the fact that a Mississippi "statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review". Mississippi University for Women v. Hogan, 458 U.S. 718, 723 (1982).

[4] Even the Court's limited approval of an ethnic classification in Hirabayashi and then in Korematsu v. United States, 323 U.S. 214 (1944), has subsequently been the subject of extensive criticism. See P. Irons, Justice at War (1983).

this Court a brief signed by Thurgood Marshall as principal author, which stated:[5]

> Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws, and this Court has struck down statutes, ordinances or official policies seeking to establish such classifications.

The concept of a "color-blind Constitution" is implicit in many decisions rendered by this Court since Brown v. Board of Education, 347 U.S. 483 (1954).[6] Recently, Batson and its progeny have strongly disapproved race-based peremptory

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[5] Brief for Petitioner, Sipuel v. Board of Regents of the Univ. of Okla. (No. 369 (Oct. Term 1947) at 27). See also, A. Kull, The Color-Blind Constitution, (1992) at 146.

[6] Appellants' Brief on the Merits at pp. 29-31.

challenges in jury trials.[7]

The argument of Appellees and their Amici that purposeful racial discrimination may sometimes be justified constitutionally as "benign" was recently answered by Justice Scalia in these words:

> A "benign" purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. See, e.g., Wygant v. Jackson Board of Education, 476 U.S. 267, 274-276 (1986) (plurality opinion) (discrimination in teacher assignment to provide "role models" for minority students); Palmore v. Sidoti, 466 U.S. 429, 434 (1984)

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[7] Batson v. Kentucky, 476 U.S. 79 (1986); Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364 (1991); Georgia v. McCollum, 505 U.S.___, 111 S.Ct. 2348 (1992); Edmonson v. Leesville Concrete Co., ___ U.S. ___, 111 S. Ct. 41 (1991); Hernandez v. New York, ___ U.S.___, 111 S.Ct. 1859 (1991). Since the right to a jury trial is second in importance only to the right to vote, these decisions requiring race-neutral peremptory challenges are especially important.

(awarding custody of child to father after divorced mother entered interracial remarriage in order to spare child social "pressures and stresses"); Lee v. Washington, 390 U.S. 333 (1968) (per curiam) (permanent racial segregation of prisoners presumably to avoid racial conflict).

* * * *

I share the view expressed by Alexander Bickel that "[T]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society", A. Bickel, The Morality of Consent, 133 (1975).[8]

To Appellees' contention that Appellants seek to "change" the Constitution, they reply that our "living Constitution" is not so inflexible as Appellees suggest and, therefore, it can take into account the "lesson of

[8] Croson, supra, n.2 at 520 (Scalia, J., concurring in judgment).

contemporary history" that the purposeful use of racial classifications in defining the rights of citizens is "immoral" and "unconstitutional".[9] To Appellants' argument that "race-neutral" congressional

[9] On various occasions this Court has made clear that the Constitution takes changing conditions into account. Thus, in wartime, the constitution "marches" and "fights". See, Lichter v. United States, 334 U.S. 742, 781-1 (1948). The Eighth Amendment's prohibition of "cruel and unusual punishment" is applied in light of "evolving standards of decency that mark the progress of a maturing society". Trop v. Dulles, 356 U.S. 86, 101 (1958). In ruling that zoning was not inconsistent with the Fourteenth Amendment guarantee of substantive due process, the Court remarked in Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), "while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise". Appellants submit that, in light of contemporary experience with the destructive effects of racism, the Fourteenth and Fifteenth Amendments do not permit in the 1990's the race-based redistricting that characterizes the North Carolina plan.

redistricting is not feasible, Appellants have a dual reply.

First, Appellees and their Amici have exaggerated the difficulties in race-neutral redistricting. The race-neutral standards invoked by Appellants are workable and have been used on occasion by the Congress and by this Court itself.[10]

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[10] For example, the Apaportionment Act of 1911, 37 Stat. 13, (1911) provided that Congressional districts should be "contiguous and compact"and have as nearly as practicable the same number of inhabitants. Although these requirements were omitted from the Apportionment Act of 1929, 46 Stat. 21 (1929), see Wood v. Broom, 287 U.S. 1 (1932), there is no indication that they were unworkable or impossible to understand. In United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977) (hereafter UJO), the plurality opinion referred to "sound districting principles such as compactness and population equality". The "compactness" of a minority group is a precondition under Thornburg v. Gingles, 478 U.S. 30, 50 (1986) for dividing a multimember district; and Growe v. Emison, supra n.1, imposes a similar condition for a single-member district. The Court's reference in Reynolds v. Sims, supra at 568, to apportionment "completely lacking in

When Appellees insist that race-conscious redistricting is inevitable and, if not done openly, will be accomplished by "proxy", they impugn the good faith of legislators and underestimate the ability of the courts to detect and remedy violations.[11]

Second, whatever its problems, race-neutral redistricting is preferable to Appellees' alternative of majority-minority districts. The racial quotas -- which Appellees seek to defend as "benign

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rationality", carries the implication that rational principles are available for use in reapportionment and redistricting. Appellants submit that these principles must be used to draft a constitutional redistricting plan in North Carolina with no resort to racial quotas.

[11] In North Carolina, where -- as in many other states -- meetings of the legislature and its committees are open to the public and well-covered by the press, the concealment of purposeful racial discrimination in redistricting is made more difficult.

discrimination" -- "only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth", see, Croson, supra, n.2 at 494 (quoting Powell, J.)[12] Thereby, a "stigma" is imposed "on the supposed beneficiaries". Id. at 516.

One Amicus brief reveals its unconscious reliance on "stereotypes" when it insists that the Twelfth Congressional District complies with "rational

[12] When, on December 18, 1991, Assistant Attorney General Dunne denied preclearance for North Carolina's reapportionment and redistricting plan, he stated that there were other boundary line configurations which would "more fairly recognize black population concentrations and provide minority voters an opportunity to select candidates of their choice ..." (see, State Appellees' Brief at p.14a). (Emphasis supplied) The Court undoubtedly realizes that, as employed in Dunne's letter, the term "candidate of their choice" was a euphemism for "African-American candidate".

redistricting principles", because "despite its odd shape, [it] is still compact -- the district recognizes a community of interest, mainly urban African-Americans with similar concerns and interests, is easily traversed and has less land area than any other North Carolina congressional district." [13] A mere glance at this "serpentine" district makes obvious that its only "community of interest" is created by race and that the "stereotype" in the minds of its creators was that any black in one end of the district would have a greater affinity with any black in another part than with a next-door neighbor of a different race.

Racial quotas "cause the same

[13] Brief of Amici Curiae Democratic National Committee, et al at p.23. Appellants have lodged with the Court various maps which show the boundaries of the Twelfth Congressional District and other districts.

corrosive animosities that the Constitution forbids in the whole sphere of government and that our national policy condemns in the rest of society as well". Id. at 510 (Kennedy, J.). The North Carolina redistricting plan will inevitably generate resentment -- not only among whites, but also among Native Americans, for whom the legislature cannot feasibly provide a quota of seats in Congress.[14]

North Carolina's oddly shaped districts also make it more difficult for a member of Congress to represent constituents properly and maintain

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[14] Race-based redistricting is a "slippery slope". The problem of omitted ethnic groups is exacerbated as the state's population becomes ever more diverse racially and includes a substantial number of Hispanics and Asian-Americans. Moreover, the creation of majority-minority districts often leads to allegations of "packing" and "racial politics" like those made in Voinovich v. Quilter, supra, n.1.

awareness of their concerns. The result is frustration and resentment among voters.

II. NO NEXUS EXISTS BETWEEN PAST RACIAL DISCRIMINATION IN NORTH CAROLINA AND RACE-BASED CONGRESSIONAL REDISTRICTING

Appellees and their Amici contend that evidence of past racial discrimination in North Carolina justifies the quotas used in the State's 1992 redistricting.[15] Although Appellants dispute that past racial discrimination could ever justify the racial quotas used by North Carolina in redistricting, they submit that here the purported justification falls especially short.

North Carolina has always used single-member districts in electing Representatives to Congress.[16] There has

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[15] See, e.g., State Appellees' Brief on the Merits at pp.45-46.

[16] As the Court recently reiterated, "we have, however, stated on many occasions that multi-member districting plans, as

been no legislative or judicial finding that any Congressional district has ever been drawn in North Carolina with the purpose or effect of depriving black voters of their right to elect to Congress the candidates they preferred; nor has there been any finding that any of the Congressional districts were drawn either with the purpose or the effect of fragmenting minority voters. Cf. Growe v. Emison, supra, n.1.

Whatever past sins of discrimination North Carolina may have committed against black voters by means of poll taxes, literacy tests, or otherwise, there has been no finding that these sins ever prevented the election of a black person to

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well as at large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts." See, Growe v. Emison, supra, n.1, at 4167.

Congress.[17] Indeed, the information submitted to the Court about the percentage of minority population which is black and the location of that population in North Carolina would strongly indicate that no such finding can be made. Under these circumstances, the North Carolina redistricting plan cannot be justified as a remedy for past discrimination; instead, it is an unearned and unwarranted racial

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[17] Appellants are unaware how many minority persons have run for Congress in recent decades. In any event, the boundaries used for Congressional districts have not been shown to have any connection with the circumstance that, until 1992, no black person had been elected to Congress from North Carolina in this century. Moreover, in Chisom v. Roemer, 111 S.Ct. 2345 (1991), the Court has explained that, under the Voting Rights Act, "inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights".

preference which impairs Appellants most basic right of citizenship.

III. THE STATE'S "PRIMARY RESPONSIBILITY" FOR CONGRESSIONAL REDISTRICTING DOES NOT JUSTIFY PURPOSEFUL RACIAL DISCRIMINATION.

In their Supplemental Brief (at pp. 8-9), the State Appellees cite two recent opinions of this Court for the proposition that "the Constitution leaves with the states primary responsibility for apportionment of their federal congressional and state legislative districts". See Growe v. Emison, 61 U.S.L.W. 4163, 4166 (1993); Voinovich v. Quilter, supra, n.1 at 4199. This proposition -- although accurate -- is singularly irrelevant to the facts alleged in the Complaint; and, if anything, it undercuts State Appellees' position.

If Attorney General Barr had allowed North Carolina to exercise its "primary

responsibility", the current redistricting plan would never have come into being. It was the Attorney General -- not the General Assembly -- who determined that the creation of two majority-minority congressional districts was required under Section 2 of the Voting Rights Act. Now it appears clear that the Attorney General erred in his interpretation and application of the Voting Rights Act.[18]

Assistant Attorney General Dunne's

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[18] In Voinovich, supra, n.1, the Court explained -- in a passage quoted by the State Appellees (Appellees' Supplemental Brief at p.6) -- that Section 2 "says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead Section 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect a candidate of its choice does it violate Section 2; where such an effect has not been demonstrated, Section 2 simply does not speak to the matter." 61 U.S.L.W. at 4202.

letter of December 8, 1991, "objected to the State's first plan on the ground that it failed to create a second majority-minority district". (Federal Appellees' Brief on the Merits at p. 11). Upon its receipt, the General Assembly -- instead of seeking judicial preclearance -- drew its second redistricting plan. Since, as the Complaint alleges, this plan was the product of federal pressure, it is ridiculous for the Appellees to try to defend the plan now by reliance on the State's "primary responsibility" for redistricting.

Indeed, the State's claim of "primary responsibility" is another reason to view with suspicion the plan's creation of majority-minority districts. In Croson, the point was made "that Congress, unlike any State or political subdivision, has a specific mandate to enforce the Fourteenth

Amendment". [19] In Appellants' view the creation of majority-minority districts would violate the Fourteenth and Fifteenth Amendments, even if it were required by Congress; but the constitutional basis for such districts is much more questionable when they are created in the exercise of State, rather than federal, responsibility.

IV. APPELLEES' RACIALLY DISCRIMINATORY INTENT WAS "INVIDIOUS"

The State Appellees have defended that their intent was "benign", rather than "invidiously discriminatory", because they acted in good faith to comply with the demands of the Federal Appellees. This defense is inconsistent with the reliance

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[19] 488 U.S. at 490. This distinction between state and federal authority helps reconcile the result in Croson with the outcome in Fullilove v. Klutznick, 448 U.S. 448 (1980) (minority set-aside in federal contracts) and in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (minority preference in allocation and distress sale of broadcast licenses.)

of the State Appellees on the "primary responsibility" of the General Assembly for the redistricting. If the State Legislature had such great responsibility, the State Appellees should not be excused because of the actions of Federal officials, whose reponsibility was not "primary".

The Appellees also misinterpret the term "invidious". In construing "invidious" in the related context of gender discrimination, the Court recently explained:

> We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious) discrimination against women. It does demand, however, at least a purpose that focuses upon women by reason of their sex -- for example (to use an example of assertedly benign discrimination), the purpose of "saving" women because they are women from a combative, aggressive profession such as the practice of law.

* * *

> "Discriminatory purpose" implies more than intent as violation or intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of", its adverse effects upon an identifiable group.[20]

In one sense, the Appellees' invidious racially discriminatory intent was directed against all the voters of North Carolina -- white and black -- for the redistricting plan purposefully subjected every voter to the adverse effects of a race-based electoral process that is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society". See A. Bickel, supra.

The invidious intent as to the five Appellants -- who are white -- can be more

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[20] Bray v. Alexandria Women's Health Clinic, ___U.S.___, 113 S.Ct. 753, 759-60 (1993).

readily perceived. If the Court accepted the "group rights" approach, on which Appellees rely,[21] both the State and Federal Appellees had an invidious discriminatory intent against whites as a group. Prior to the 1990 census, all eleven members of Congress from North Carolina were white; but in 1992, only ten of the twelve persons elected to Congress were white. Under Appellees' "group rights" logic, this reduction in the number of white members would be a "retrogression"in the ability of whites to elect members of their race to serve in Congress. Since this "retrogression" was demanded by the Attorney General and the State Appellees acceded to that demand, all

[21] Appellants, of course, continue to contend that a "group rights" approach is fatally flawed because voters' rights under the Fourteenth and Fifteenth Amendments are "personal".

the Appellees possessed an "invidious" discriminatory intent against Appellants and all other white voters.[22]

The most evident invidious discriminatory intent was directed by the State Appellees against Appellants Shaw and Shimm, whom Appellees' redistricting plan

[22] 28 CFR § 51.54 (a) describes "Retrogression" in this way: "A change affecting voting is considered to have a discriminatory effect under Section 5 if it will lead to a retrogression in the position of members of a racial or language minority group (i.e. will make members of such a group worse off than they had been before the change) with respect to their opportunity to exercise the electoral franchise effectively. See Beer v. United States, 425 U.S. 130, 140-42 (1976)". If Appellees' "group rights" premise is accepted, Appellants cannot understand why members of a racial majority would be precluded from claiming that their own Fourteenth and Fifteenth Amendment rights have been violated by the "retrogression" in the majority's right to choose members of their own race to represent them in Congress. After all, equal protection was intended for all citizens -- not merely those who are members of a minority.

placed in the Twelfth Congressional District. As reflected in the bizarre shape of that district, the purpose of the State Appellees was to meet the Attorney General's requirements by assuring that the member of Congress elected from this district would be black. A subsidiary purpose was to limit the meaningful choice of the Twelfth District voters to black candidates. Moreover, it was recognized -- and, indeed, intended -- that the member of Congress to be elected from this district would have a racial, rather than a geographic, constituency.[23]

The purpose of Appellees was to achieve certain results which they knew

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[23] The odd shape of the Twelfth District and its demographics made it unlikely that white voters, such as Appellants Shaw and Shimm, could develop any community of interest with other voters or any meaningful relationship with their Representative.

would have adverse effects on Appellants and many other white voters[24] -- especially in the "grotesque" Twelfth Congressional District. Nevertheless, in order to perform what they believed to be "benign" social engineering, Appellees went ahead despite those inevitable adverse effects.[25] Under the test approved in Bray, supra, the Appellees' racially discriminatory intent was "invidious".

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[24] Appellants submit that black voters, as well as white, were victims of this unconstitutional redistricting plan. Indeed, a race-based electoral process is so "destructive of democratic society" that Appellees' redistricting plan will have an adverse effect on every citizen in North Carolina.

[25] The adverse effects purposefully inflicted on them by Appellees' racially discriminatory redistricting plan give Appellants standing to bring this action. Moreover, Appellants submit that the adverse effects of the plan are so pervasive that any voter in North Carolina has standing to attack it under the Fourteenth and Fifteenth Amendments.

CONCLUSION

Appellants' Complaint alleged facts sufficient to establish that the State and Federal Appellees acted in concert, with an invidious racially discriminatory purpose, to violate Appellants' constitutional rights by creating two majority-minority congressional districts for the purpose of assuring that two black persons were elected to Congress from North Carolina. Therefore, the Order dismissing the Complaint should be set aside.

Respectfully submitted,

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